UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA and THE COMMONWEALTH OF MASSACHUSETTS, Plaintiffs, v. SPRAGUE RESOURCES LP and SPRAGUE OPERATING RESOURCES, LLC, Defendants.	)	Civil No. 1:20-cv-11026-LTS

UNITED STATES' CONSENTED-TO MOTION TO ENTER CONSENT DECREE WITH INCORPORATED MEMORANDUM OF LAW

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), respectfully submits this consented-to motion to enter the Consent Decree attached hereto as Exhibit 1 (the "Consent Decree" or "Decree"), which has been approved and signed by all other parties to this action, including Co-Plaintiff the Commonwealth of Massachusetts ("Massachusetts" or the "Commonwealth") and Defendants Sprague Resources LP and Sprague Operating Resources, LLC (collectively, "Sprague" or "Defendants"). The Consent Decree was lodged with the Court on May 29, 2020. Dkt. Nos. 1-4 (Notice of Lodging), 1-5 (Consent Decree).[1] Consistent with 28 C.F.R. § 50.7, the proposed Decree provides for a 30-day public comment period. CD ¶ 77. This period commenced on June 4, 2020, upon publication of a notice of the Decree's lodging in the *Federal Register*. 85 Fed. Reg. 34466

[1] As discussed in Section III.C below, the attached Consent Decree is identical to the earlier lodged version, except for the addition of Paragraphs 9 and 10 of Appendix G (regarding injunctive relief at Sprague's South Portland, Maine, facility), which the parties inadvertently omitted from the version of the Decree lodged on May 29, 2020, the inclusion of the case number in the caption, and Judge Sorokin's name in the Court's signature block.

(June 4, 2020). In response to a request by the City of South Portland, the United States published a subsequent notice in the *Federal Register*, on July 2, 2020, extending the public comment period through August 5, 2020. 85 Fed. Reg. 39934 (July 2, 2020). During this extended comment period, which is now closed, the United States received approximately 18 public comments. These comments are attached to this Memorandum as Exhibit 2 and are referenced by Bates number herein and in the accompanying Responsiveness Summary attached hereto as Exhibit 3. The Responsiveness Summary contains the United States' responses to the public comments.

After carefully considering the comments, the United States has concluded that the Consent Decree is fair, reasonable, and consistent with the Clean Air Act. Accordingly, the United States requests that the Court approve the Consent Decree and enter it as a final judgment, under Fed. R. Civ. P. 54 and 58, and Paragraph 81 of the Consent Decree. Sprague consents to entry of the Decree. *See* Decree ¶ 77 ("Defendants consent to entry of this Consent Decree without further notice…."). Counsel for the United States has conferred with counsel for the Commonwealth, and the Commonwealth continues to support entry of the Consent Decree.

I. BACKGROUND

Under the proposed Consent Decree, Sprague will implement measures intended to limit emissions of volatile organic compounds ("VOCs") from seven facilities in four New England states. These facilities store and distribute heavy petroleum products known as Number 6 oil ("No. 6 oil") and asphalt. Among other things, No. 6 oil is used to heat industrial boilers and asphalt is used to pave roads. The tanks in question emit VOCs mainly because No. 6 oil and asphalt are stored at high enough temperatures to keep them in liquid rather than solid form,

which allows the product to be moved through pipes to and from trucks and barges. Sansevero Decl. ¶ 5. Heating the tanks increases VOC emissions to levels greater than they would be at ambient temperatures. Thus, the loading and unloading of the tanks, as well as the heated storage of these petroleum products, all generate VOC emissions. *Id.*

The proposed settlement addresses alleged violations of the Clean Air Act, Massachusetts air pollution laws, and other state regulations requiring permits for the control of VOCs. These laws regulate VOC emissions to the air because of the contribution of VOCs to the formation of ground-level ozone, a component of photochemical smog, or haze, which has a range of public health impacts.[2]

A. Statutes And Regulations

The United States and Massachusetts filed their Complaint on May 29, 2020, under Section 113(a)(1) and 113(b) of the Clean Air Act (or "Federal Act"), 42 U.S.C. §§ 7413(a)(1) and 7413(b), the Massachusetts Clean Air Act (the "Massachusetts Act"), M.G.L. c. 111, §§ 142A-142O, and the Massachusetts state implementation plan ("MA SIP"), including Massachusetts air pollution control regulations 310 C.M.R. 7.00 *et seq* ("MA Regulations"). The Complaint also includes claims by the United States under the Maine state implementation plan ("ME SIP"), including Maine's Air Pollution Control Regulations Chapters 100-165 ("ME Regulations"); the New Hampshire state implementation plan ("NH SIP"), including New Hampshire's air pollution control requirements Env-A Chapters 100-3600; and the Rhode Island Air Pollution Control Regulations Numbers 1-38 ("RI Regulations"). The United States and

[2] EPA Region 1, *Ground-level Ozone (Smog) Information*, currently available at https://www3.epa.gov/region1/airquality/index.html.

Massachusetts seek civil penalties and injunctive relief arising from unpermitted emissions of volatile organic compounds ("VOCs") at two of Sprague's No. 6 oil and asphalt storage and distribution facilities in Massachusetts, and the United States seeks similar relief at four other No. 6 oil and asphalt facilities owned and operated by Sprague in Maine, New Hampshire, and Rhode Island.

1. The Federal Act

The Federal Act establishes a comprehensive scheme for air pollution prevention and control. Section 110(a) of the Federal Act, 42 U.S.C. § 7410(a), requires that each state prepare a state implementation plan ("SIP") incorporating regulations designed to attain and maintain healthful air quality. A state must submit its SIP, and any revisions to the SIP, to EPA for approval. If EPA approves a SIP or SIP revision, EPA may enforce the SIP's requirements and any permits authorized by the SIP. 42 U.S.C. § 7413(a)-(b).

Under the Act, EPA has designated ozone as an ambient air pollutant, and has developed a national ambient air quality standard ("NAAQS") for ozone. 40 C.F.R. § 50.9. Ozone forms when VOCs react with oxides of nitrogen ("NOx") in sunlight.[3] To control ozone formation that leads to smog, EPA and states have generally sought to control VOCs and NOx emissions through the regulations set forth in SIPs. The Federal Act's structure thus requires the cooperation of states to reduce air pollution. For example, when states develop SIPs to reduce air pollutants to allowable levels, they include a permit system as part of their plan to make sure sources of

[3] EPA Region 1, *The Ozone Problem*, currently available at https://www3.epa.gov/region1/airquality/oz_prob.html.

pollution, such as power plants, factories, and other industrial facilities, meet their clean air goals.[4]

Additional requirements apply to "major" sources of air pollution.[5] Under Section 502(a) of the Federal Act and EPA regulations at 40 C.F.R. § 70.7(b), no person shall operate a major source after the date it was required to submit an application for a Title V operating permit, except in compliance with a permit issued under the state's operating program. Section 503(2) of Title V of the Federal Act and EPA regulations at 40 C.F.R. § 70.5 require that a major source submit a timely and complete Title V operating permit application within 12 months of commencing operation as a major source.

2. Massachusetts SIP

The MA Regulations require a facility to obtain a "Plan Approval" from Massachusetts Department of Environmental Protection ("MassDEP") prior to any construction, substantial reconstruction, alteration, or subsequent operation of a facility that may emit air contaminants. MA Regulations at 310 C.M.R. 7.02(1)(b), 7.02(3)(a), 7.02(8)(a)(2). The MA SIP and the MA Regulations further prohibit any subsequent operation of the facility without a Plan Approval addressing VOC emissions with applicable emissions limitations. MA SIP at 310 C.M.R. 7.02(2)(a); MA Regulations at 310 C.M.R. 7.02a(1)(b), 7.02(3)(a), 7.02(8)(a)(2). The MA Regulations also prohibit false statements. 310 C.M.R. 7.01(2)(a).

[4] EPA, Office of Air Quality Planning and Standards, *The Plain English Guide to the Clean Air Act* (April 2007), at 7, currently available at https://www.epa.gov/clean-air-act-overview/plain-english-guide-clean-air-act.

[5] In this case, only Sprague's Newington Facility qualifies as a major source. *See infra* CD § I.A.4 (discussing definition of "major source" under New Hampshire SIP).

3. Maine SIP

The ME SIP prohibits the emission of any air contaminant, such as VOCs, from any source without an air emission license, unless the source falls within one of the exemptions in Section II.C of Chapter 115. To receive an air emission license, an owner or operator must demonstrate, among other things, that the air emissions from its facility will be addressed adequately, including where appropriate compliance with the technology requirements specified in Section VI of Chapter 115. ME SIP, Ch. 115, § V.A.2.a.

4. New Hampshire SIP

Under the NH SIP, the owner or operator of a major stationary source of VOCs must apply for and obtain from the New Hampshire Department of Environmental Services ("NHDES") a temporary permit addressing air pollutants, such as VOC emissions, before the commencement of construction or installation of any new or modified device or the operation of any existing device. NH SIP at Env-A 602.01, 603.01, 603.03, 610.04 (effective through October 25, 2015), and 618.04 (effective October 26, 2015, 80 Fed. Reg. 57722 (Sept. 25, 2015)). Following such construction, the owner or operator of a major source of VOCs must apply for and obtain from NHDES an operating permit requiring the implementation of measures to adequately address VOC emissions. Env-A 602.02, 603.01, 603.03, 610.04 (effective through October 25, 2015), and 618.04 (effective October 26, 2015, 80 Fed. Reg. 57722 (Sept. 25, 2015)). The NH SIP defines, in relevant part, a "major source" to mean a stationary source subject to 40 C.F.R. Part 70 with the potential to emit 50 tons per year or more of VOCs. Env-A 101(53)(c)(2).

Under the NH SIP, the owner or operator of a miscellaneous VOC stationary source is required to implement measures to adequately address VOC emissions. *See* NH SIP at Env-A 1222.02. The NH SIP defines a "miscellaneous" VOC stationary source to mean, in relevant part, a stationary source with combined theoretical potential VOC emissions for all processes and devices that equal or exceed 50 tons of VOCs per consecutive 12-month period. Env-A 1222.02.

5. Rhode Island SIP

The RI SIP provides that an owner or operator of a stationary minor source, which does not have the potential to emit VOCs in amounts at or above the major source threshold of 50 tons per year, must obtain from the Rhode Island Department of Environmental Management ("RIDEM") a minor source permit addressing air contaminants such as VOC emissions before the commencement of construction, installation, or modification of any stationary source that has the potential to emit one hundred pounds or more per day, or ten pounds or more per hour, of any air contaminant. RI Regulation 9.3.1(g), 9.3.3.

B. Defendants' Facilities

Defendants own and operate storage and distribution facilities for heated petroleum products in Everett, Quincy, and New Bedford, Massachusetts, Searsport and South Portland, Maine, Newington, New Hampshire, and Providence, Rhode Island (collectively, the "Facilities"). Of those Facilities, EPA issued notices of violations ("NOVs") of the Clean Air Act and state SIPs at all but the New Bedford Facility. Declaration of Christine Sansevero, Ex. A.1 – A.6 (NOVs), attached hereto as Exhibit 4. At its Facilities, Defendants use heated tanks to store No. 6 oil and asphalt. Sansevero Decl. ¶ 5. Defendants' activities at these Facilities include the transfer of heated No. 6 oil and asphalt from barges or other ships, through

pipes, to the Facilities' storage tanks. *Id*. The heated No. 6 oil and asphalt are pumped from these tanks, through pipes and loading racks into tanker trucks or marine vessels. *Id*. No. 6 oil and asphalt are solid or semi-solid at ambient temperatures and must be kept heated, at approximately 130 and 300 degrees Fahrenheit, respectively, to stay in liquid form, with low enough viscosity to be pumped through pipes between storage tanks and barges, other vessels, or tanker trucks. *Id*. But heating the tanks increases VOC emissions from No. 6 oil and asphalt to levels greater than at ambient temperatures. *Id*. Thus, these loading and unloading operations, as well as the heated storage of these petroleum products, all generate VOC emissions. *Id*.

In 2011, to quantify the levels of VOC emissions generated by Sprague's heated No. 6 oil and asphalt storage tanks, EPA issued testing orders requiring Sprague to conduct on-site tests of VOC emissions from vents on top of the tanks. *Id.* Ex. A.1 – A.6 (NOVs). Sprague conducted these tests in 2012 and 2013. *Id.* Based on the test results, EPA discovered that VOC emissions were high enough to trigger permitting requirements and that a number of Sprague's Facilities lacked required permits addressing VOC emissions from these heated tanks. *Id*.

1. Everett Facility

In 2001, Sprague purchased the Everett Facility, which stores and distributes asphalt in heated tanks. Sansevero Decl., Ex. A.1 (NOV for Everett Facility) at 2. The previous owner had discontinued operations and shut down the facility in 1997. *Id.* In 2002, Sprague made substantial upgrades in order to reopen the facility. *Id.* On March 13, 2015, EPA issued a Notice of Violation to Sprague alleging, among other things, that Sprague failed to seek or obtain a Plan Approval from MassDEP for Sprague's reopening, construction, substantial reconstruction, or

alteration of the Everett Facility, and that Sprague failed to implement applicable VOC emission limitations at the Everett Facility, in violation of the MA SIP. *Id.* at 3-4.

2. Quincy Facility

Sprague purchased the Quincy Facility in 1995, and in subsequent years made a series of changes to the Facility involving the storage and distribution of No. 6 oil in a heated tank. Sansevero Decl. Ex. A.2 (NOV for Quincy Facility) at 2. On March 16, 2017, EPA issued a Notice of Violation to Sprague for its failure to seek or obtain Plan Approval from MassDEP in connection with its construction, substantial reconstruction, or alteration of the Quincy Facility, and for its failure to implement VOC emission limitations at the facility in accordance with the MA SIP. *Id.* at 3.

3. Searsport Facility

The Searsport Facility has an air emissions license issued by the Maine Department of Environment Protection ("ME DEP") on May 21, 2013, and amended on July 21, 2015. Sansevero Decl. Ex. A.3 (NOV for Searsport and South Portland Facilities). Until its amendment on July 21, 2015, the Searsport Facility's license did not address the Facility's VOC emissions from the storage and distribution of No. 6 oil and asphalt in heated tanks, as required by the ME SIP. *Id.* On April 16, 2014, EPA issued a Notice of Violation to Sprague for its failures to seek or obtain a license addressing its VOC emissions from No. 6 oil and asphalt at the Searsport and South Portland Facilities. *Id.* at 3-4.

4. South Portland Facility

The South Portland Facility has an air emissions license issued by ME DEP on March 29, 2011. Sansevero Decl. ¶ 19, Ex. A.3 (NOV for Searsport and South Portland Facilities). Until it

was amended on July 21, 2015, the facility's air emissions license did not address VOC emissions from the storage and distribution of No. 6 oil and asphalt from the Facility's heated tanks, as required by ME SIP. Sansevero Decl. ¶ 18, Ex. A.4 (supplemental NOV for South Portland Facility). On April 16, 2014, EPA issued a Notice of Violation to Sprague for its failures to seek or obtain a license addressing its VOC emissions from No. 6 oil and asphalt operations at the Searsport and South Portland Facilities. *Id*.

Over several years Sprague made modifications to the No. 6 oil and asphalt equipment at its South Portland Facility. Sansevero Decl. ¶¶ 11-16, Ex. A.4. On December 11, 2014, EPA sent Sprague a second Notice of Violation for the South Portland Facility, concerning its failure to seek or obtain a license addressing VOC emissions from its modifications. *Id.*

5. Newington Facility

In or around 2009, Sprague converted its asphalt storage and distribution operations at the Newington Facility to No. 6 oil. Sansevero Decl. Ex. A.5 (NOV for Newington Facility). On March 17, 2015, EPA issued a Notice of Violation to Sprague regarding the Newington Facility alleging, among other things, that Sprague violated the NH SIP by (a) converting heated asphalt storage tanks to heated No. 6 oil storage tanks without first obtaining a temporary permit and an operating permit addressing emissions, (b) owning and operating a major VOC source without adequately addressing emissions, and (c) owning and operating a major source without timely applying for a Title V operating permit under the CAA. *Id.*

6. Providence Facility

Over a period of years, Sprague made changes to the heated asphalt and No. 6 oil tanks at its Providence Facility. Sansevero Decl. Ex. A.6 (NOV for Providence Facility). On June 14,

2017, EPA sent Sprague a Notice of Violation alleging that the company violated the RI SIP by constructing, installing, or modifying the Providence Facility without applying for or obtaining a permit from RIDEM for No. 6 oil and asphalt storage and distribution, or adequately limiting VOC emissions. *Id.*

C. **Complaint**

The Complaint alleges in twenty counts that Sprague violated the Federal Act, and state statutes, regulations, and SIPs, at six facilities in four states, including Massachusetts, Rhode Island, New Hampshire, and Maine.

1. Everett Facility

The Complaint alleges that Defendants violated, and continue to violate: the MA SIP and MA Regulations by reactivating the previously shutdown Everett Facility and its heated asphalt tanks without applying for and obtaining a MassDEP Plan Approval, and by constructing, substantially reconstructing, or altering the Facility without applying for or obtaining a MassDEP Plan Approval; and the MA Regulations by operating the Facility without holding a MassDEP Plan Approval, by creating a condition of air pollution at the Everett Facility, and by filing inaccurate source registration statements for the Everett Facility. Complaint ¶¶ 173-207.

2. Quincy Facility

The Complaint alleges that Defendants violated the MA SIP and MA Regulations by constructing, substantially reconstructing, or altering the Quincy Facility's heated No. 6 oil tank without applying for and obtaining a MassDEP Plan Approval, and the MA Regulations by operating the facility without holding a MassDEP Plan Approval, by creating a condition of air

pollution at Quincy Facility, and by filing inaccurate source registration statements. *Id.* ¶¶ 208-233.

3. Searsport Facility

The Complaint alleges that Defendants violated ME SIP Chapter 115 by failing to obtain an emissions license adequately addressing VOC emissions from heated #6 oil and asphalt storage tanks at the Searsport Facility. *Id.* ¶¶ 234-244.

4. South Portland Facility

The Complaint alleges that Defendants violated ME SIP Chapter 115 by failing to obtain an emissions license adequately addressing VOC emissions from heated #6 oil and asphalt storage tanks at the South Portland Facility, and by commencing construction of modifications to those tanks without an air emissions license. *Id.* ¶¶ 245-264.

5. Newington Facility

Regarding the Newington Facility, the Complaint alleges that Defendants violated the NH SIP by failing to apply for and obtain a temporary permit with respect to the Facility's storage and distribution of No. 6 oil in heated tanks, by failing to apply for and obtain an operating permit, and by failing to adequately address VOC emissions; and violated Title V of the Federal Act by failing to obtain an operating permit. *Id.* ¶¶ 265-301.

6. Providence Facility

The Complaint alleges that Defendants violated the RI SIP by constructing, installing, or modifying the Providence Facility without applying for and obtaining permits from RIDEM addressing VOCs from heated #6 oil and asphalt storage tanks. *Id.* ¶¶ 302-319.

II. CONSENT DECREE

A. Summary of Terms

After EPA issued the NOVs, the United States, the Commonwealth, and Defendants commenced settlement discussions aimed at addressing the violations alleged in the Complaint and limiting the potential for excess emissions in the future. After years of settlement negotiations, in which each side was represented by competent counsel and consulted with experts in the relevant technical areas, the parties reached a mutually acceptable resolution, the terms of which are reflected in the Consent Decree.

As discussed more fully below, the Consent Decree requires that Defendants implement injunctive measures and pay $350,000 in civil penalties, including $205,000, plus interest, to the United States and $145,000 (without interest) to the Commonwealth. Decree ¶ 9.

The Consent Decree requires that Defendants obtain permits or permit amendments from the applicable state permitting authorities that establish operational restrictions to limit VOC emissions, including limits on the amount of No. 6 oil and asphalt allowed to flow through Sprague's facilities ("throughput limits"), and the number of tanks that Sprague may use to store No. 6 oil and asphalt at any one time. *Id.* App. C-I. In addition, Sprague will install, operate and maintain carbon bed emission reduction systems on all heated tanks at its South Portland Facility and develop and implement an operation and maintenance plan for an existing carbon bed system at its Quincy Facility. *Id.* App. D, G. Under the Decree, Defendants will operate the Facilities in accordance with these requirements for the longer of (a) the term of the consent decree (at least five years) or (b) the period from entry of the Decree until Defendants obtain from the State a permit or permit amendment with provisions at least as stringent as those of the Decree. *Id.* ¶ 74.

If Defendants fail to meet the requirements of the Consent Decree, they would be subject to stipulated penalties. *Id.* ¶¶ 28-39. In return for the payment of civil penalties and performance of injunctive measures discussed above, the Consent Decree resolves the civil claims of the United States and the Commonwealth for the violations alleged in the Complaint through the date of the Decree's lodging, subject to certain standard reservations of rights. *Id.* ¶¶ 59-60.

The $350,000 in civil penalties that Defendants are required to pay for past violations is consistent with EPA's 1991 Clean Air Act Stationary Source Civil Penalty Policy.[6] Among other things, the penalty reflects the seriousness of the violations while at the same reflecting the parties' assessments of their relative litigation risks. Sprague has communicated to EPA that implementation of the injunctive relief measures will cost at least $769,000. Sansevero Decl. ¶ 21. EPA estimates that implementation of the Decree's injunctive measures will reduce potential VOC emissions by over 80 tons per year. *Id.* ¶ 9.

B. <u>The District of Maine Has Approved A Similar Settlement</u>

On December 19, 2019, the United States District Court for the District of Maine entered a consent decree resolving claims similar to those in this case, in which the United States alleged violations of the Clean Air Act and Maine SIP related to VOC emissions from heated petroleum storage tanks at another facility in South Portland, Maine. *United States v. Global Partners LP*, No. 2:19-cv-122-DBH, 2019 WL 6954274, at *1 (D. Me. Dec. 19, 2019). The *Global* consent decree required defendants to pay a civil penalty of $40,000, plus interest, and to spend at least

[6] EPA, *Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991), currently available at https://www.epa.gov/enforcement/clean-air-act-stationary-source-civil-penalty-policy-october-25-1991.

$150,000 to perform a supplemental environmental project. *See id.* at *2, *4, *5. Like the Decree in this case, the *Global* decree required defendants to seek a permit or permit amendment from the state permitting authority that establishes operational restrictions to limit VOC emissions, including throughput limits on the amount of No. 6 oil and asphalt allowed to flow through the defendant's facility, and the number of tanks that defendant may use to store No. 6 oil and asphalt at any one time. Consent Decree ¶¶ 11.a-e, *Global*, No. 2:19-cv-122-DBH (Dkt. No. 24, Dec. 19, 2019).

III. ARGUMENT

A. Legal Standard for Approval of a Consent Decree

"[I]t is the policy of the law to encourage settlements." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). There is "a strong public policy in favor of settlements, particularly in very complex and technical regulatory contexts." *United States v. Comunidades Unidas Contra la Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000) (citing *Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 59 (1st Cir. 1993)). "Moreover, such a policy has added bite where the settlement has been advanced for entry as a decree by a government actor 'committed to the protection of the public interest' and specially trained and oriented in the field." *Comunidades Unidas*, 204 F.3d at 280 (citing *Cannons Eng'g Corp.*, 899 F.2d at 84)).

Considering this "strong public policy" in favor of settlements, a district court reviews a consent decree to ensure that it is both procedurally and substantively fair, reasonable, and consistent with the objectives of the underlying statute. *City of Bangor v. Citizens Commc'n Co.*, 532 F.3d 70, 93-94 (1st Cir. 2008); *see Comunidades Unidas*, 204 F.3d at 279 ("There is no

question that a consent decree must bear the imprimatur of a judicial judgment that it is fair, adequate, reasonable, and consistent with the objectives of Congress.") (citation omitted). Although approval of a consent decree is a judicial act committed to the informed discretion of the district court, *City of Bangor*, 532 F.3d at 93-94, the court's role is a limited one. The relevant standard for the court's determination is "not whether the settlement is one which the court itself might have fashioned, or considers ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the government statute." *Cannons*, 899 F.2d at 84; *Harris v. Pernsley*, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987) ("The Court may either approve or disapprove the settlement; it may not rewrite it."), *aff'd* 820 F.2d 592 (3d. Cir. 1987). The court's inquiry need not be all-encompassing and need not include protracted examination of the precise legal rights of the parties or resolve the merits of the claims. *Bragg v. Robertson*, 83 F. Supp.2d 713, 717 (S.D.W. Va. 2000); *accord Comunidades Unidas*, 204 F.3d at 281.

Not only should a district court's review of a consent decree be narrow in scope, it also "must defer heavily to the parties' agreement and the EPA's expertise." *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994). As the Supreme Court has stated:

> [S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.

Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961). "The presumption in favor of settlement is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency specially equipped, trained or oriented in the field," such as EPA. *United States v. Cannons Eng'g Corp*, 720 F. Supp. 1027, 1035 (D.

Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990). Accordingly, judicial review of a settlement agreement negotiated by the government does not involve de novo evaluation of the settlement's merits or "second guessing" the Executive Branch's decision to enter into a proposed settlement. *Comunidades Unidas*, 204 F.3d at 280*; see Cannons*, 899 F.2d at 84 (courts should "refrain from second-guessing the Executive Branch"); *accord Sam Fox Publ'g Co.*, 366 U.S. at 689. Rather, in reviewing a settlement involving a federal agency, the court "must exercise some deference to the agency's determination that settlement is appropriate." *Conservation Law Found.*, 989 F.2d at 58 (citing *Federal Trade Comm'n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987)). Moreover, the public policy in favor of settlement is particularly strong in environmental cases. *See In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1029 (D. Mass. 1989) ("Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation.").

Deference should also be granted to entry of a consent decree with the federal government because it is an official act of the Attorney General, who has "exclusive authority and plenary power to control the conduct of litigation in which the United States is involved, unless Congress specially authorizes an agency to proceed without the supervision of the Attorney General." *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992) (citing 28 U.S.C. § 516 and *FTC v. Guignon*, 390 F.2d 323, 324 (8th Cir. 1968)). Thus, the Attorney General has considerable discretion to decide whether and on what terms to enter into a settlement. *Hercules*, 961 F.2d at 798 (citing *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928)); *Cannons*, 899 F.2d at 84; *see Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 515-16

(W.D. Mich. 1989) ("the balancing of competing interests affected by a proposed consent decree [to which the government is a party] 'must be left, in the first instance, to the discretion of the Attorney General'") (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)).

In sum, the Court's role in reviewing the proposed Consent Decree is limited. If the consent decree is fair, adequate, and reasonable, it should be approved without modification. Moreover, in determining whether to approve the proposed Consent Decree, the Court should defer to EPA's expertise in protecting human health and the environment through implementation of the applicable Clean Air Act requirements, and to the Attorney General's expertise and discretion in conducting government litigation, assessing litigation risk, and determining whether settlement terms are in the public interest.

For the reasons discussed below, the proposed Consent Decree meets the requirements for district court approval: it is fair, reasonable, and faithful to the objectives of the Clean Air Act.

A. The Decree Is Reasonable, Fair, and Consistent with the Clean Air Act

1. *The Consent Decree is Fair*

The fairness of a consent decree must be evaluated in both procedural and substantive aspects. *See Cannons*, 899 F.2d at 86 (explaining that "fairness in the … settlement context has both procedural and substantive components").

Procedural fairness demands that the parties negotiated at arm's length and in good faith. *United States v. Davis*, 261 F.3d 1, 23 (1st Cir. 2001); *Communidades Unidas*, 204 F.3d at 281. Procedural fairness is measured by the level of candor, openness, and bargaining balance involved in the negotiation process. *Cannons*, 899 F.2d at 86.

Substantive fairness is related to procedural fairness, because "[t]o the extent that the process was fair and full of 'adversarial vigor,' the results come before the court with a much greater assurance of substantive fairness." *Cannons*, 899 F.2d at 87 n.4 (internal citation omitted). Substantive fairness derives from concepts of corrective justice and accountability: how much or how little should a settling party be expected to do or pay in order to correct environmental wrongs? *Communidades Unidas*, 204 F.3d at 281. Because these concepts are not easily quantified in environmental cases, EPA's expertise and conclusions receive "the benefit of doubt when weighing fairness." *Cannons*, 899 F.2d at 88; *see City of Bangor*, 532 F.3d at 97 ("Usually, there is deference to the EPA's judgment on fairness, and no independent court inquiry.").

The proposed Consent Decree resulted from procedurally fair settlement negotiations. The negotiations were conducted at arms-length and continued for a period of approximately four years, culminating in the lodging with the Court of the proposed Consent Decree. The parties engaged in extensive negotiations concerning the terms of the Consent Decree, including civil penalties and injunctive relief. Throughout the entirety of this process, each side was represented by experienced counsel. The parties proceeded in good faith. The Decree reflects the parties' careful and informed assessment of how to bring Defendants into compliance with the Act. Where, as here, a proposed consent decree is "the product of good faith, arms-length negotiations" it is "presumptively valid." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (citation omitted). Both the United States and Defendants will benefit from resolving the alleged violations without further costs and delays associated with litigation. *See United States v. Davis*, 261 F.3d 1, 26 (1st Cir. 2001) (noting that a consent decree may take into account

"reasonable discounts for litigation risks, time savings, and the like that may be justified"). For these reasons, the Decree is procedurally fair.

The Consent Decree also is substantively fair. EPA estimates the Decree will result in total potential VOC emission reductions of over 80 tons per year. Sansevero Decl. ¶ 9. The civil penalty, and the costs associated with Defendants' performance of the injunctive relief, will help deter Sprague and other companies from polluting the air in violation of the Federal Act and state SIPs. The requirements that Defendants pay stipulated penalties for not complying with the Decree's obligations will act as a deterrent against future violations and facilitate enforcement of the Decree in the event of any future violations of its provisions. Thus, the Decree is fair, and any doubt should be resolved in EPA's favor. *Cannons*, 899 F.2d at 88; *City of Bangor*, 532 F.3d at 97.

2. *The Consent Decree is Reasonable*

The reasonableness of a proposed consent decree depends on how well the relief is "tailored" to redress the injuries alleged in the Complaint. *Comunidades Unidas*, 204 F.3d at 281. Courts need not examine the reasonableness of a proposed consent decree for "mathematical precision," but should defer to EPA's judgment that the decree is reasonable. *Davis*, 261 F.3d at 26. The reasonableness of a consent decree may be determined in light of whether it is technically adequate to cleanse the environment, fully compensates the public for the alleged violations, and takes into account the risks of litigation. *Cannons*, 899 F.2d at 89-90. In assessing a decree's reasonableness, courts consider each provision in the context of the decree as a whole. *See, e.g., United States v. District of Columbia*, 933 F. Supp. 42, 51 (D.D.C.

1996 *United States v. Kerr-McGee Corp*., No. 07-CV-01034, 2008 WL 863975, at *9 (D. Colo. Mar. 26, 2008).

In this case, the Decree is reasonable because it requires that Defendants take specific actions tailored to stop the violations alleged in the Complaint and help prevent them from recurring in the future. *Communidades Unidas*, 204 F.3d at 281. The Decree compensates the public for the alleged violations, and provides specific and general deterrence, by requiring Defendants to implement effective injunctive measures estimated to cost at least $769,000 and pay civil penalties totaling $350,000. The Decree will help maintain the national ambient air quality standard for ozone in the region, resulting in a total potential VOC reduction of over 80 tons per year. Sansevero Decl. ¶ 9.

Settlement of this matter also reflects the parties' assessments of their relative litigation risks and promotes "the policy of the law to encourage settlements." *Cannons*, 899 F.2d at 84 (1st Cir. 1990); *see also Comunidades Unidas*, 204 F.3d at 280 (noting "the strong public policy in favor of settlements, particularly in very complex and regulatory contexts"). "It is almost axiomatic that voluntary compliance on an issue where there is potential disagreement is a better alternative than the uncertainty of litigation over that issue." *District of Columbia*, 933 F. Supp. at 51. The proposed Decree is a reasonable alternative to costly and uncertain litigation.

3. *The Consent Decree Advances the Goals of the Clean Air Act*

The Decree advances the Clean Air Act's goals because it protects air quality and health, and is in the public interest. Congress passed the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The Consent Decree furthers

these objectives by requiring Defendants to take specific steps to regulate emissions that are harmful to human health and the environment from the Facilities, resulting in controls on the tonnage of VOC emissions per year. "Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation." *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1029 (D. Mass. 1989). The proposed Decree is consistent with the Act's goals, and the Court should enter it as a final judgment in this matter. *See Charles George Trucking*, 34 F.3d at 1085 (district court "must defer heavily to the parties' agreement and the EPA's expertise").

C. Considering the Public Comments, Entry of the Consent Decree is Appropriate

The United States has carefully considered the public comments it received and addressed them in detail in the Responsiveness Summary, attached hereto as Exhibit 3. All of the comments relate to two of the six facilities addressed in the Complaint: the South Portland, Maine, and Newington, New Hampshire, facilities. None of the comments discloses facts or considerations indicating that the proposed judgment is inappropriate, improper, or inadequate. Although the Responsiveness Summary addresses these comments more fully, to assist the Court, we highlight our responses to the main comments here.

First, in their comments, the City of South Portland and others correctly note that the Consent Decree lodged with the Court on May 29, 2020, lacked a provision requiring Sprague to seek a license amendment from the State of Maine that incorporates the operational limits required by the Decree for the South Portland Facility, including limits on throughput and on the

number of tanks Sprague may use to store No. 6 oil and asphalt. Decree App. G ¶¶ 1-3. This was an inadvertent omission by the parties that has been corrected in the attached revised Consent Decree. Sansevero Decl. ¶ 14. The United States and Sprague had agreed to such licensing provisions during settlement discussions and had included them in earlier drafts of Appendix G to the Consent Decree. Restoring such permitting requirements for the South Portland Facility conforms the requirements for that facility to those for all other applicable Facilities. *See* Responsiveness Summary at 3-4 § II. Accordingly, the United States has filed concurrently with this Motion, as Exhibit 1 hereto, an amended version of the Consent Decree that restores the inadvertently omitted language. *See* Decree App. G ¶¶ 9-10 (restored permitting provisions).

Second, the Town of Newington and others comment that the relief in the Consent Decree relating to the Newington Facility should address certain odor complaints that the Town has received over the past two years, in a manner similar to the provisions addressing odors at Sprague's South Portland Facility. The Clean Air Act and NH SIP do not authorize EPA to regulate emissions solely because of their odor impacts, and Sprague did not agree to include in the Consent Decree supplemental measures to address VOC emissions that also address odors. Nevertheless, Sprague has agreed to address odors at its Newington Facility through other means. *See* Responsiveness Summary at 6-7 § IV; Leduc Decl. *passim*. While not conceding that its facility has caused the odors referenced in the comments, Sprague's Director of Health, Safety, Environment and Sustainability, Jay Leduc, states in a sworn declaration, attached hereto as Exhibit 5, that Sprague is taking action to address potential odors at the Newington Facility by restarting and operating previously installed odor control equipment at the Newington

Facility. Leduc Decl. ¶ 16. According to Mr. Leduc, Sprague concluded that the odors referenced in the comments are likely due in large part to ongoing asphalt paving operations over the past two years along stretches of a nearby highway. *Id.* ¶¶ 5-6. Nevertheless, Sprague commits to working cooperatively with Newington and NHDES to address any odors associated with the Newington Facility. *Id.* ¶ 17. Because these odor concerns are being addressed through other means, and for the other reasons discussed in Section IV of the accompanying Responsiveness Summary, the Decree does not include further provisions with respect to odor control in Newington. *See* Responsiveness Summary at 6-7 § IV.

Third, commenters from South Portland raise concerns regarding the health impacts of hazardous air pollutants ("HAPs"). This case addresses alleged violations related to emissions of VOCs, not HAPs. EPA investigated the HAP emissions from heated No. 6 and asphalt tanks at Sprague's Facilities and concluded that, in contrast to these facilities' VOC emissions, their HAP emissions do not exceed federally regulated levels. Sansevero Decl. ¶ 15. For these reasons, as discussed more fully in the Responsiveness Summary, the claims in the Complaint are limited to VOC emissions. *See* Responsiveness Summary at 4-6 § III.

Fourth, the City of South Portland comment that the United States should provide a 90-day public comment period, instead of the 30 days required by Department of Justice regulations. 28 C.F.R. § 50.7. In response, the United States doubled the length of the comment period, extending it to 60 days. The City did not object to this extension. *See* Responsiveness Summary at 1 § I.

Fifth, in its comment, the City of South Portland expressed concern about the accuracy of the emissions estimates for Sprague's South Portland Facility that form the basis of the

Complaint. The City of South Portland and Town of Newington also comment that the Consent Decree should require continuous emissions monitoring or, in the alternative, frequent emissions testing. EPA estimated VOC emissions at Sprague's facilities based on empirical testing performed by Sprague at its own facilities, in contrast to Sprague's emissions estimates which are based on modeling rather than testing. EPA reviewed each methodology for estimating emissions and concluded that its methodology based on testing is more accurate and reliable than Sprague's methodology based on modeling. EPA also determined that continuous emissions monitoring equipment is not necessary to address the VOC emissions at issue in this case because the protections afforded by other provisions of the Decree are sufficient. The Decree imposes throughput limits on the Newington and South Portland facilities, which are designed to ensure that Sprague does not exceed the "minor source" threshold of 50 tons per year of VOCs. *See* Responsiveness Summary at 8-9 § V.

Sixth, the Town of Newington and the City of South Portland comment that they should be able to review the design plan and operation and maintenance plan for carbon systems at the South Portland and Newington Facilities pursuant to the Consent Decree. Newington also comments that the carbon bed systems at the Newington Facility should be operational at all times. The United States is the only party that has asserted claims against Sprague related to the South Portland facility and the only entity that has enforcement rights under the Consent Decree and, therefore, it is appropriate that the Decree provides for review and approval of deliverables required under the Decree for that facility by the United States only. Further, while the United States has asserted no claim relating to odors in the Complaint and while the Clean Air Act contains no provisions imposing limits on odors, Sprague has advised that it has restarted use of

previously installed odor control systems at the Newington Facility and will work cooperatively with the Town and NHDES in addressing any odors associated with the facility. *See* Responsiveness Summary at 9-10 § VI; Leduc Decl. ¶¶ 16-17.

Finally, the City of South Portland comments that Sprague should have paid civil penalties to the State of Maine. But the State of Maine is not a party to this case and so is not able to receive a civil penalty. The Miscellaneous Receipts Act prohibits the United States from sharing any penalties owed to it with any other person or entity. *See* 31 U.S.C. § 3302(b), (any civil penalty paid in settlement of the federal claims must be deposited into the United States Treasury); Responsiveness Summary at 11 § VII.

III. CONCLUSION

The Consent Decree requires Sprague to operate its Facilities and obtain state permits or permit amendments as needed to adequately address the violations alleged in the Complaint and to pay a civil penalty to the United States and to the Commonwealth. Because the Consent Decree is fair, reasonable, and consistent with the goals of the Clean Air Act, the United States respectfully requests that the Decree be entered as an order of the Court.

Respectfully Submitted,

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January 8, 2021
Dated

/s/ David Laufman Weigert

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